Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-136

In re Application of

ELLIS THOMPSON CORPORATION — File No. 14261-CL-P-134-A-86

For facilities in the Domestic Public Cellular Radio Telecommunications Service on Frequency Block A in Market No. 134, Atlantic City, New Jersey

ORDER

Adopted: October 6, 1995; Released: October 17, 1995

By the Commission:

1. This order denies an application for review by Ameritel seeking review of a Review Board memorandum opinion and order which affirmed the denial of Ameritel's petition to intervene in this proceeding.[1] *Ellis Thompson Corp.*, 10 FCC Rcd 7325 (1995), *affirming*, FCC 95M-68 (Mar. 7, 1995). We agree with the Board that Ameritel has not demonstrated its right to intervene.

I. BACKGROUND

2. In this proceeding, the Commission designated for hearing the application of Ellis Thompson Corporation (Thompson) for authority to construct and operate a cellular telephone system in Atlantic City, New Jersey. *Ellis Thompson Corp.*, 9 FCC Rcd 7138 (1994). The Commission found that there are substantial and material questions as to whether a third party became a real-party-in-interest in the Thompson application contrary to the Commission's rules. *Id.* at 7138 ¶ 1. The hearing designation order was published in the Federal Register on January 5, 1995. *See* 60 F.R. 1776 (Jan. 5, 1995).

3. On Monday, February 6, 1995, Ameritel, which describes itself as an Ohio general partnership, filed a petition to intervene pursuant to 47 C.F.R. § 1.223(a), which provides that a person who qualifies as a party-in-interest may intervene in a proceeding by filing within 30 days of the publication of a hearing designation order a petition "showing the basis of [petitioner's] interest."[2] *See also* 47 U.S.C. § 309(e). Ameritel claimed the right to party status in this proceeding as the successor-in-interest to Ameritel, Inc., which had filed an application mutually exclusive with Thompson's. Thompson was selected to construct and operate the Atlantic City system by lottery. Ameritel, Inc.'s application was selected fifth in the lottery. Ameritel supported its petition with a declaration by Richard Rowley, which stated: "I am a general partner in Ameritel ("Ameritel"), successor-in-interest to Ameritel, Inc."

4. Administrative Law Judge Joseph Chachkin (ALJ) denied Ameritel's petition on March 7, 1995. He held (FCC 95M-68 at ¶ 3):

> Ameritel has failed to establish that it is the successor-in-interest to Ameritel, Inc., the 1986 applicant for the non-wireline authorization. Ameritel's claim rests solely on the bare declaration of Richard Rowley, a general partner in Ameritel. Ameritel offers no supporting evidence for Rowley's assertion. In any event, the available facts do not support a finding that Ameritel is the successor-in-interest of Ameritel, Inc. As related by the parties [in oppositions filed February 15 and 21, 1995], based on state records, Ameritel, Inc., the applicant, ceased to exist as a separate entity when it was merged into another entity, Metrotec, Inc. on June 15, 1988. Further, while a new entity also calling itself Ameritel, Inc. was incorporated in Ohio in 1993, there is no record of a general partnership under the name of Ameritel doing business in Ohio. Under Ohio law, all persons or entities transacting business in the state must, at the very least, file a fictitious name report with the Secretary of State[3] . . . . Therefore, Ameritel's request to intervene as a matter of right will be denied.

5. Following the ALJ's denial of its petition, Ameritel, on March 21, 1995, sought leave to file a response to the other parties' oppositions to further explain why it is the successor-in-interest to Ameritel, Inc.[4] The ALJ denied this motion and dismissed Ameritel's response on March 24, 1995. *Ellis Thompson Corp.*, FCC 95M-84 (Mar. 24, 1995).

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[1] Before the Commission are: (1) Application for Review of Review Board Decision Affirming Denial of Petition to Intervene Under 47 USC 309(e), filed August 7, 1995, by Ameritel, (2) Joint Opposition to Ameritel Application for Review, filed August 22, 1995, by the Wireless Telecommunications Bureau, Telephone and Data Systems, Inc., Ellis Thompson Corporation, and Comcast Cellular, and (3) a Reply to Opposition, filed September 5, 1995, by Ameritel.

[2] Ameritel also sought leave to intervene under the discretionary provisions of 47 C.F.R. § 1.223(b). It does not, however, contest the adverse resolution of that issue in its application for review.

[3] OHIO REV. CODE ANN. § 1329.01(D) (Baldwin). Under Ohio law, a partnership has a fictitious name when its name does not include the surnames of its partners. *See Duris Enterprises v. Moore*, 458 N.E.2d 451, 453 (Ohio App. 1983). The fictitious name report includes the names and addresses of the partners.

[4] The response indicates that Ameritel, Inc. merged into Metrotec, Inc., which thereafter was liquidated. The assets of Metrotec, Inc., including the Atlantic City application, were distributed to Metrotec's stockholders, who thereupon formed the partnership, Ameritel. The response further indicates that the service mark "Ameritel" has been registered to Gene A. Folden, one of Ameritel's partners, since before the formation of Ameritel, Inc., and that Folden now consents to the registration of "Ameritel" as a trade name by the partnership.

He noted that Ameritel filed its pleading some 30 days after the oppositions and 14 days after the ALJ's ruling. He found that "Ameritel provides no explanation for its inexcusably tardy pleading, which will be dismissed."

6. The Board affirmed the denial of Ameritel's petition. The Board, citing 47 U.S.C. § 309(d)(1), relating to petitions to deny, ruled that Ameritel's petition was fatally defective because it lacked "specific allegations of fact sufficient to show that petitioner is a party-in-interest." Specifically, the Board found that Ameritel's petition did not offer any explanation "about how, when, and by whom Ameritel, Inc., a corporation, had been changed to a partnership." 10 FCC Rcd at 7326 ¶ 6. The Board also affirmed the ALJ's dismissal of Ameritel's March 21 response. The Board observed that this pleading was filed some 60 days after publication of the hearing designation order and after the ALJ's ruling on Ameritel's petition. It found that the Commission's procedural rules do not authorize replies to oppositions to interlocutory requests such as petitions to intervene (*see* 47 C.F.R. § 1.294(b)) and that the response was filed after the 30-day time period for seeking intervention as of right. 10 FCC Rcd at 7326 ¶ 7.

II. APPLICATION FOR REVIEW

7. Ameritel contends that it was not required to further support the assertion of its general partner that it is the successor-in-interest to Ameritel, Inc. or to explain how it attained that status. It argues that the Board mistakenly applied to a petition to intervene the more stringent "specific allegations of fact" standard, which is applicable under § 309(d) to petitions to deny. According to Ameritel, it is merely required to show the basis of its interest, which Rowley's declaration does. Ameritel also asserts that the findings that: (1) Ameritel, Inc. merged into Metrotec, Inc. in 1988; (2) a new corporation called Ameritel, Inc. was formed in Ohio in 1993; and (3) no partnership called Ameritel is registered in Ohio do not undermine its claim that it is the successor-in-interest of the original Ameritel, Inc.[5]

8. Ameritel's opponents respond that the Board correctly evaluated Ameritel's petition since the standards for establishing the right to intervene and the right to file a petition to deny are the same. They also contend that, because Ameritel's petition to intervene was defective on its face, it is irrelevant what inferences the ALJ might have drawn from Ameritel, Inc.'s merger and the other facts of record. In any event, they maintain that Ameritel's own March 21 response reflects a substantial change in ownership between the original Ameritel, Inc. and Ameritel, and that Ameritel cannot properly be considered the applicant's successor-in-interest.[6] Ameritel denies these allegations.

III. DISCUSSION

9. Although we agree with the Board's disposition of this matter, we wish to comment on certain aspects of the Board's ruling. First, we agree with Ameritel's opponents that, in light of the serious questions raised by the opponents, Ameritel for failed to provide on a timely basis "specific allegations of fact" in support of its claimed status as the successor-in-interest to Ameritel, Inc. A party-in-interest for purposes of intervention is also a party-in-interest for purposes of filing a petition to deny. *RKO General, Inc.*, 89 FCC 2d 297, 326 n.125 (1989). Thus, the standards are implicitly the same in either context. Moreover, it is implicit in the requirement that petitioners to intervene show the basis of their interest that they allege sufficient specific facts for the Commission to determine whether they have the interest claimed. *See Elm City Broadcasting Corp. v. U.S.*, 235 F.2d 811, 816 (D.C. Cir. 1956).[7] While the generalized assertion by its principal that Ameritel is the successor-in-interest of Ameritel, Inc. may have been sufficient in the absence of allegations to the contrary, it is clearly inadequate in the face of seemingly contradictory evidence in the public record cited by the ALJ. It is no answer that this evidence does not necessarily undermine Ameritel's claimed interest; Ameritel has the burden of affirmatively establishing its interest.

10. Second, while Ameritel's application for review does not appeal the rejection of Ameritel's March 21 response, we believe that comment is warranted. Although the rules do not provide for replies to oppositions to most interlocutory requests, including petitions to intervene, 47 C.F.R. § 1.294(d) provides that the ALJ (or other decisionmaker) may authorize additional pleadings. Ameritel sought leave from the ALJ to file its response in accordance with that provision. In this regard, the ALJ has broad discretion to regulate the course of proceedings. *See Hillebrand Broadcasting, Inc.*, 1 FCC Rcd 419 ¶ 3(1986). We see no abuse of that discretion in the ALJ's ruling that Ameritel's response, filed, without explanation, some 30 days after the other parties' oppositions and after the ALJ issued his ruling on the petition to intervene, was inexcusably tardy.[8] We believe that Ameritel should have filed a more timely request to respond to the allegations made by the opponents, and, had they done so, the ALJ might well have found good cause to accept it.

IV. ORDER

11. ACCORDINGLY, IT IS ORDERED, That the Application for Review of Review Board Decision Affirming Denial of Petition to Intervene Under 47 USC 309(e), filed August 7, 1995, by Ameritel IS DENIED.

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[5] Ameritel's application for review does not affirmatively assert that Ameritel is the successor-in-interest of Metrotec, Inc., into which Ameritel, Inc. merged. While the application for review states that under Ohio law it would not have to register under the Ohio fictitious name statute if "Ameritel" were registered as a trade name, it does not affirmatively assert that the partnership has in fact registered "Ameritel" as a trade name. Ameritel denies any relationship to the corporation currently doing business as Ameritel, Inc.

[6] Ameritel's opponents also contend that Ameritel, Inc. was not incorporated until after filing its application for this facility.

[7] . . . . the only legislative purpose in requiring petitioners for intervention to show "the basis for their interest" is to enable the Commission to determine whether petitioners' allegations show them to be "parties in interest."

[8] We note that if Ameritel's response were considered a petition for reconsideration of the ALJ's ruling it would also be defective. A petition for reconsideration relying on facts not previously presented must generally show that the facts are new or newly discovered. 47 C.F.R. § 1.106(c).

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary